Supreme Court, U.S.
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No. 97-0611

In The

Supreme Court of the United States

October Term, 1997

TROY L. GRAVES,

Petitioner,

v.

VESUVIUS USA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The following are parents of Vesuvius USA:

Vesuvius Crucible Company, Cookson America, Inc. and Cookson Group, PLC.

There are no nonwholly-owned subsidiaries of Vesuvius USA.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Vesuvius USA ("Vesuvius") respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Troy L. Graves, seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on May 5, 1997.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below.

Petitioner filed suit on August 22, 1995, alleging that Vesuvius discriminated against him on the basis of his race when Vesuvius decided to terminate Petitioner's employment. (Record p. 1). Petitioner claimed discrimination under Title VII of the Civil Rights Act and under 42 U.S.C. § 1981. On May 23, 1996, Vesuvius filed a Motion for Summary Judgment requesting that the Court grant summary judgment on both causes of action brought by Petitioner against Vesuvius. (Record p. 50). After the Motion was fully briefed by the parties, on July 17, 1996, the Court granted Vesuvius' Motion for Summary Judgment and entered a final judgment dismissing the case. (Record pp. 319 and 337 and Petitioner's Appendix, hereinafter "Appendix" p. 1). Petitioner filed his Notice of Appeal to the U.S. Court of Appeals for the Fifth Circuit on August 13, 1996. (Record p. 341). The District Court found that Petitioner's Section 1981 action was barred by limitations and Petitioner did not appeal this portion of

the summary judgment. The U.S. Court of Appeals for the Fifth Circuit affirmed the District Court Judgment in an unpublished opinion entered on May 5, 1997. (Appendix p. 18).

Statement of Facts

On January 8, 1993, Calvin Bell, an African-American supervisor at the Vesuvius plant, instructed Petitioner, an African-American employee under his supervision, to help with the cleanup and storage of materials from the casting floor, as other employees had been instructed.[1] Petitioner responded by stating that he had punched out his time card and was going to leave the plant. Bell instructed Petitioner to punch in again and get to work as he had not completed the work he was instructed to do. Approximately twenty minutes or so later, Bell saw Petitioner at the breakroom/timeclock area, and again instructed Petitioner to get back to work. Petitioner asked Bell if Bell was serious, and Bell told him that he was. Petitioner then walked out of the building and got into his truck, and as he did so Bell again warned Petitioner that he had better return to work. Petitioner then left in his truck. Jimmy Middleton, another supervisor, also African-American, witnessed Bell ordering Petitioner back to work.[2]

After Petitioner left, Bell explained the incident to his supervisor, Mark Sullivan. Bell and Sullivan then

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[1] The statement of facts is taken from the Affidavit of Calvin Bell (Record pp. 60-61).

[2] Middleton confirms this in his Affidavit. (Record p. 63).

informed James Johnson, Manufacturing Manager, and they reviewed the situation. After reviewing what had happened and looking at Petitioner's time card, it was learned that Petitioner had not already punched out when Bell first ordered him back to work at 1:40 p.m., but that he actually punched out at 2:04 p.m., after Bell had ordered him back to work several times.

At no time did Petitioner ask Bell for permission to leave work, nor did Bell ever give him permission to leave. Petitioner did not tell Bell that he was going to clock out, but did tell Bell at 1:40 p.m. that he had already clocked out.

On Monday, January 11, 1993, James Johnson, Mark Sullivan, and Calvin Bell met about Petitioner, and they collectively decided that Petitioner had to be terminated for violating a work rule which required him to follow a supervisor's directive. The three supervisors then met with Petitioner to discuss his refusal to return to work the previous Friday and the fact that he was being terminated for his refusal to follow a supervisor's directive. Bell was comfortable with the collective decision to terminate Petitioner. The decision to terminate Petitioner had nothing to do with his race, and the same decision would have been made if he had been white.

REASONS FOR DENYING THE WRIT

Petitioner appears to assert two reasons why this Court should grant a Writ of Certiorari in this case. First, Petitioner claims this is a significant case of public interest. Second, Petitioner claims there is a split in the Courts

of Appeals on the standard for summary judgment in Title VII of the Civil Rights Act cases. In fact, this case is not a significant case. Further, this case does not conflict with the other Court of Appeal cases cited by Petitioner. Neither this case separately nor when reviewed with other Courts of Appeal cases justify the granting of the writ of certiorari requested by Petitioner. Petitioner's reasons are discussed in turn below.

First Ground – This Case Is Not a Significant Decision

The Petitioner contends that this is a case of "grave significance." It is a case, like all cases, which is important to the parties. However, the Petitioner's own conduct and the Fifth Circuit Court's handling of this case clearly show that it is not a case of such importance.

Petitioner here only provided the deposition testimony of Petitioner in response to Respondent's Motion for Summary Judgment. Petitioner did not provide affidavits of other employees who confirmed the claimed discrimination or who contradicted the Respondent's reasons for Petitioner's termination. Petitioner did not provide documents of Respondent which contradicted Respondent's reasons for terminating Petitioner's employment. Petitioner did not provide deposition testimony of supervisors or management officials of Respondent who contradicted Respondent's reasons for terminating Petitioner's employment. Indeed, although Petitioner contends that Petitioner would have liked to ask certain questions of Petitioner's supervisor on cross-examination (Petitioner's Petition p. 18), Petitioner failed to take any depositions in this case. Petitioner clearly had

the opportunity to do so. The summary judgment was not granted until eleven days before the trial of this case would have taken place. Further, Petitioner failed to file a motion under Rule 56 of the Federal Rules of Civil Procedure claiming that he needed additional time to respond to a Motion for Summary Judgment. Thus, Petitioner's own conduct in conducting discovery in this matter and in responding to the Motion for Summary Judgment show that this is not a significant case.

In reviewing this case, the Fifth Circuit Court of Appeals determined that this case was not a significant case. The Court wrote only a two paragraph opinion. (Appendix pp. 18-19). The Fifth Circuit Court of Appeals specifically noted that the decision was not to be published and that the decision was not precedent for other cases. There was no dissent as all three judges agreed on this result. Thus, it is clear that the Fifth Circuit Court of Appeals felt that this case did not have grave importance.

Further, the fact that this case is not of importance generally is shown by the fact that Petitioner has been unable to show that the Fifth Circuit Court inaccurately stated the law. At most, Petitioner contends that the Fifth Circuit's review of the evidence was incorrect. It would be impractical and impossible for this Court to review each of the circuit court's handling of the evidence in all the cases decided by these circuit courts. Indeed the Court's own rules make it clear that the granting of a writ of certiorari for such an evidentiary review is not favored. Rule 10 of the Rules of the Supreme Court of the United States.

Second Ground – No Split in the Circuits

Petitioner contends that this Court should grant a writ of certiorari to review this case because of a claimed split in the decisions of the Circuit Courts of Appeals. Petitioner makes this contention because the summary judgment for the employer in this case was affirmed while the summary judgments granted by the trial courts were reversed in the other cases cited by Petitioner. Petitioner cites *Pollock v. AT&T Long Lines*, 794 F.2d 860 (3rd Cir. 1986); *Rodriguez v. General Motors Corp.*, 904 F.2d 531 (9th Cir. 1990); *Cole v. Ruidoso Municipal Schools*, 43 F.3d 1373, 1377-1381 (10th Cir. 1994).

Petitioner first criticizes this Court for its decision in the *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Petitioner argues that the *St. Mary's* decision has created confusion; however, Petitioner then cites the three cases noted above, two of which predated the *St. Mary's* decision by seven and three years respectively.

Petitioner's claim of a split in authority is not backed by a string of cases holding one way in one circuit or set of circuits and another string of cases in another circuit or circuits stating the law differently. Instead, out of the hundreds of employment discrimination cases and employment discrimination summary judgment cases decided by the circuit courts, Petitioner presents this case and three others.

Petitioner cannot assert a split in the Circuit Courts of Appeals based on the opinion in this case. Petitioner cannot contend that the Fifth Circuit Court of Appeals has incorrectly stated the law and is in conflict with the

other courts. The Fifth Circuit Court of Appeals did not write an opinion with a substantive statement of the law in this case.

Petitioner attempts to show a split in the Circuit Courts of Appeals by arguing that the evidence in this case and those cases were substantially similar while the decisions of the Fifth Circuit and the other Circuits were different; however, a review of the evidence in those cases clearly indicates that the evidence in each of the other cases was substantially different from the evidence in this case. In *Pollock*, an African-American employee claimed she was discharged because of her inability to do certain work. The employee's claim that she was discriminated against because of her race was supported by the affidavit of a white employee. The white employee's affidavit corroborated the plaintiff's position and noted certain facts and certain of his own experiences including the fact that he had also been unable to successfully do the same work but had not been terminated. *Pollock*, 794 F.2d at 865. This evidence gave rise to an inference that AT&T had discriminated against Pollock.

There was no comparable evidence in this case. Petitioner provided no evidence to the trial court other than his own deposition testimony. There was no other employee who corroborated Petitioner's statements or who presented evidence that Petitioner was not treated as well as other employees. There was no evidence which would give rise to an inference that Respondent discriminated against Petitioner. Thus, the position of the Third Circuit Court of Appeals in the *Pollock* case is not in conflict with the decision of the Fifth Circuit Court of Appeals in this case. There is no indication that these

Courts were using a different legal standard. Instead, it is clear that the Third Circuit and the Fifth Circuit reached a different result because they were reviewing substantially different evidence.

In *Rodriguez*, the employee complained of discrimination because he failed to receive a promotion. The employer gave three reasons for its action against the employee. The employer stated that: (1) the position was already filled when the employee applied; (2) that a group of employees including the plaintiff agreed that another employee was the best qualified; and (3) that a supervisor believed the other employee was better qualified although the supervisor apparently never considered the plaintiff because the supervisor believed the plaintiff never applied for the job while it was open. *Rodriguez*, 904 F.2d at 533. The court noted that the three reasons were inconsistent with each other and thus, summary judgment was improper.

Again, there was no comparable evidence in this case. In this case, the Respondent's reasons for terminating Petitioner's employment were consistent. Petitioner was terminated because of his conduct on a Friday afternoon when Petitioner left work despite instructions from his supervisor to return to work, and when Petitioner had falsified his time card by failing to clock out when he quit working. In this case, the Respondent's reasons arise out of the same incident of misconduct and are consistent with each other. The Ninth Circuit in *Rodriguez* and the Fifth Circuit in this case are not in conflict as to any statement of the applicable legal standard for summary judgment. Instead, the two Courts reached a different result because the evidence presented in each case was

different. The different evidence in these two cases led to a different result.

In *Cole*, the employee, a school principal, claimed discrimination based on her sex. The employer first claimed that the employee was transferred and demoted because of budget reasons. *Cole*, 43 F.3d at 1380. The employer later claimed the demotion and transfer was because the employee was unable to maintain a cohesive faculty. Thus, the employer gave two completely different reasons at two different points in time. However, the plaintiff did not stop there in producing evidence of pretext.

The plaintiff showed that the employer's own excellent evaluations of her performance contradicted the reasons given by the employer. The plaintiff also provided affidavits of other teachers that showed that the problems with the faculty began during the tenure of the previous principal, a male who had been promoted. In addition, the plaintiff provided evidence of test scores which showed that her students' test scores rose from the forty-third percentile to the seventy-third percentile during her tenure as principal. Thus, the plaintiff there provided an array of evidence contradicting the employer's claim that she had poorly performed. The Tenth Circuit Court was reviewing a situation in which a large amount of evidence including the employer's own evaluations contradicted the reasons given by the employer.

Such evidence was not presented by Petitioner here. Petitioner relied only on the Petitioner's own testimony that disputed the Respondent's reasons for termination. The Petitioner did not show that the reasons given by the

Respondent for the termination changed. The Petitioner did not provide affidavits of other employees that contradicted the reasons given by Respondent. The reasons given by Respondent for termination of Petitioner were not contradicted by Respondent's own evaluations of Petitioner.

The decisions of the Tenth Circuit Court in *Cole* and of the Fifth Circuit here do not show any indication of a different legal standard; however, there is clear showing that the evidence presented in the two cases differed. The Tenth Circuit and the Fifth Circuit reached different results because the evidence which they reviewed was greatly different.

Third Ground – This Case Was Correctly Decided

A. Summary of This Argument.

This is a relatively simple case. It is a case where the Respondent's actions had nothing to do with race but where Petitioner has alleged discrimination based on race. Petitioner, an African-American male, worked under an African-American male supervisor, Calvin Bell. Petitioner refused to return to work after repeated requests from Mr. Bell and instead left the plant. This action was witnessed by another supervisor, Jimmy Middleton, also African-American. The actions of Petitioner were reported to others in management and the decision was made to terminate the employment of Petitioner. Mr. Bell participated in this decision and agreed that it was made without regard to the race of the Petitioner. Respondent's action and the reasons for it were shown by Mr. Bell and Mr. Middleton's affidavits. Thus, summary

judgment was properly granted to Respondent. Even if Petitioner established a *prima facie* case by disputing the workrule violation, Respondent produced a legitimate non-discriminatory reason for its action. Petitioner failed to prove that Respondent's legitimate non-discriminatory reason was a pretext and thus summary judgment was proper.

B. Summary Judgment Evidence.

In support of the Motion for Summary Judgment, Respondent submitted the Affidavit of Petitioner's immediate supervisor, Calvin Bell, the Affidavit of Jimmy Middleton, a witness to Petitioner's confrontation with his supervisor, and the Affidavit of David McPherson which authenticates Respondent's Employee Handbook. (Record pp. 60-61, and 65-79). Petitioner submitted no summary judgment evidence except excerpts from Petitioner's deposition and attached exhibits. The summary judgment proof including these affidavits and Exhibits demonstrated that no genuine issue of material fact existed as to the motivation for Petitioner's termination and that such termination was not motivated by Petitioner's race. As a result, Respondent was entitled to a summary judgment.

C. Summary Judgment on Petitioner's Title VII Claims was Proper.

Petitioner complains that his termination was motivated by his race in violation of Title VII of the Civil Rights Act of 1964. (Petition, Record pp. 1-12). Broadly speaking, in order to have a cause of action under Title

VII for race discrimination, the Petitioner must show that he was discharged "because of" his race. 42 U.S.C. § 2000e-2(a)(1). In other words, he must prove that the Respondent intentionally discriminated against him because of his race or that race was a substantial motivating factor in the Respondent's adverse employment decision. *McDonnell Douglas Corp. v. Green*, 411 U.S. 721, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Because direct proof of discriminatory intent is often difficult to find, the Supreme Court has adopted a tripartite inquiry and burden shifting process for the evaluation of the evidence proffered on the issue of discrimination. As set forth in *McDonnell Douglas Corp.*, and as articulated in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), a plaintiff must first establish a *prima facie* case of discrimination regarding the adverse employment action taken against him. Second, if the plaintiff establishes a *prima facie* case, the burden shifts to the defendant employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. Finally, after the defendant employer articulates a legitimate, non-discriminatory reason, the burden shifts back to the plaintiff who must demonstrate that the articulated rationale is merely a pretext for unlawful discrimination. *McDonnell Douglas Corp.*, 411 U.S. at 802-4; *Burdine*, 450 U.S. at 252-3; *see Wilson v. Belmont Homes*, 970 F.2d 53 (5th Cir. 1992).

The elements of a plaintiff's *prima facie* case for a work rules violation case such as here consist of evidence that he was within a protected class and that he did not violate the work rule or that, if he did, white employees who engaged in similar acts were not punished similarly.

Mayberry v. Vought Aircraft Company, 55 F.3d 1086, at 1089-90 (5th Cir. 1995); *see also McDonnell Douglas Corp.*, 411 U.S. at 802; *Burdine*, 450 U.S. at 248; *Bienkowski v. American Airlines*, 851 F.2d 1503, 1506 (5th Cir. 1988).

If a plaintiff can demonstrate such a *prima facie* case, the burden then shifts to the defendant employer to articulate legitimate, non-discriminatory reasons for its contested actions. However, the burden of proof remains with the plaintiff at all times. The defendant employer need only put forth its non-discriminatory rationale but need not prove it by a preponderance of the evidence in order to eliminate the presumption created by the *prima facie* case. *Burdine*, 450 U.S. at 254; *Wilson*, 970 F.2d at 57; *McDaniel v. Temple Independent School District*, 770 F.2d 1340, 1346 (5th Cir. 1985).

Following a defendant-employer's articulation of a non-discriminatory reason for a particular action, the plaintiff then bears the ultimate burden of proving that the true, underlying reason for the defendant-employer's actions was intentional, unlawful discrimination. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715-16, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *McDaniel*, 770 F.2d at 1346. In meeting the ultimate burden of proving pretext, the plaintiff must show that the defendant-employer's actual intent was to discriminate. Thus, evidence that an employer made an incorrect or poor decision is insufficient. *McDaniel*, 770 F.2d at 1348; *see Wilson*, 970 F.2d at 57 (inquiry is not into merits of employer's decision but into the motives). The question is not whether an employer made an erroneous decision; it is whether the decision was made with discriminatory motive. *Mayberry*, 55 F.3d at 1091.

In *Mayberry*, the Fifth Circuit affirmed the district court's grant of summary judgment for an employer accused of racial discrimination. *Mayberry* involved a black employee who was suspended for poor workmanship after four separate disciplinary actions were issued within a year for previous instances of poor workmanship in violation of Vought's Code of Conduct. Vought used a progressive discipline program consisting of a verbal warning, written warning, suspension, and termination. Mayberry claimed that his suspension was on account of his race, and/or in retaliation for prior discrimination claims brought against Vought and his participation in demonstrations against Vought for its alleged discriminatory practices. The Fifth Circuit affirmed the district court's holding that "Mayberry failed to establish a *prima facie* case of discrimination, and, assuming a *prima facie* case of discrimination, that Mayberry was unable to overcome Vought's defense that the suspension resulted from its honest belief that Mayberry had violated the work-rule." *Id.* at 1089.

Mayberry claimed that he did not violate work-rules, and that similarly situated white employees were treated differently. *Mayberry*, 55 F.3d at 1090. To establish a *prima facie* case based on disparate treatment, the plaintiff "must show that white employees were treated differently under circumstances 'nearly identical' to his." *Id.* (citations omitted) (emphasis added). Mayberry failed to produce evidence that white employees in "nearly identical" circumstances had been treated differently. The court construed the "nearly identical" language strictly and emphasized Mayberry's failure to produce evidence of white employees who also had a history of poor work

performance, but were not disciplined similarly. *See id.* at 1090 n.3; *Little v. Republic Refining Co. Ltd.*, 924 F.2d 93, (5th Cir. 1991) 96-97 (rejecting rebuttal evidence of disparate treatment because circumstances were not "nearly identical").

Vought met Mayberry's claim that he not violated any work-rules with a legitimate, nondiscriminatory assertion that Vought's decision to suspend Mayberry was based solely on its conclusion, following an investigation, that Mayberry was at least partially at fault for the scrapping of over $8,000 in material. *Id.* at 1090. In attempting to prove pretext, Mayberry simply reasserted his *prima facie* evidence and attempted to rely on Vought's admission that machine error may have been partially responsible. *Id.* & n.4. The Court rejected Mayberry's attempt to rely on Vought's uncertainty about the machine error in order to raise a fact issue regarding Vought's nondiscriminatory reason. The Court stated that "[t]he question is not whether an employer made an erroneous decision; it is whether the decision was made with discriminatory motive." *Id.* at 1091. In the absence of any evidence challenging the credibility of Vought's nondiscriminatory reason for the suspension, summary judgment was deemed appropriate. *Id.* at 1091 & n.6.

In this action, Petitioner supplied only his own testimony that he did not violate the work rule. By his own testimony, Petitioner attempted to contradict the testimony of the two African-American supervisors that he in fact did violate the work rule by ignoring his supervisor's repeated request that he return to work. Respondent's Employee Handbook provides that "Failing to carry out any reasonable order by a management representative,

including to work on jobs assigned by supervisor or his authorized representative" is grounds for termination. (Record p. 76). (See also Subsection E of the Third Ground herein which discusses Respondent's other reason for the termination of Petitioner's employment.) Even if this Court believes that Petitioner did prove a *prima facie* case, the summary judgment proof provided by Respondent conclusively demonstrated a non-discriminatory and legitimate reason for Petitioner's termination: his blatant disobedience of repeated directives from his immediate supervisor. That such insubordination is a legitimate, non-discriminatory reason for termination of employment cannot reasonably be questioned. *See Klein v. Trustees of Indiana University*, 766 F.2d 275 (7th Cir. 1985) (summary judgment on Title VII claim upheld where defendant articulated insubordination as basis for termination).

In their affidavits, Petitioner's immediate supervisor, Calvin Bell, and another witness, Jimmy Middleton, laid to rest any contention that Petitioner's termination was based upon an impermissible motive. By articulating a legitimate, non-discriminatory reason for Petitioner's termination, Respondent shifted the burden of proof back to Petitioner. Petitioner was then required to submit evidence that created a fact issue as to whether each of the employer's stated reasons was legitimate and evidence that creates a reasonable inference that Respondent intentionally discriminated on the basis of race in the actions of which Petitioner complained. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996). Because Petitioner submitted no competent summary judgment proof to carry this burden of proof, or even to create a fact issue on this

element, Respondent was entitled to summary judgment on Petitioner's Title VII claim as a matter of law. *Klein*, 766 F.2d at 283.

Petitioner's statements of his subjective belief that racial discrimination occurred do not show that the Respondent's reason for discharge, i.e., the employee refused to return to work when asked to do so, was a pretext. Such personal perceptions or subjective beliefs are not enough to allow Petitioner to avoid summary judgment. *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996). "It is more than well-settled that an employee's subjective belief that he suffered an adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion, in the face of proof showing an adequate nondiscriminatory reason." *Id.* at 1419.[3]

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[3] (This quotation continues as follows) *See, e.g., Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 434 (5th Cir. 1995) ("bald assertions of age discrimination are inadequate to permit a finding that proscribed discrimination motivated [defendant's] actions against [plaintiff]"); *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir. 1994) (employee's "self-serving generalized testimony stating her subjective belief that discrimination occurred . . . is simply insufficient to support a jury verdict in plaintiff's favor"); *Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 96 (5th Cir. 1991) ("an age discrimination plaintiff's own good faith belief that his age motivated his employer's action is of little value"); *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 246 (5th Cir. 1985) ("we cannot allow subjective belief to be the basis for judicial relief when an adequate nondiscriminatory reason for the discharge has been presented"); *Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 566 (5th Cir. 1983) ("generalized testimony by an employee regarding his subjective belief that his discharge was the result

The summary judgment evidence showed that it was an African-American supervisor who requested Petitioner to return to work and another African-American supervisor (i.e., two persons of the same race as Petitioner) who saw Petitioner commit the rules violation in question. Further, the summary judgment evidence showed that the supervisor involved in the termination of Petitioner stated that race was not considered and that the same decision would have been made if Petitioner was white. Also, the summary judgment evidence showed that such a work rules violation was grounds for termination under the employer's personnel policy. The precise rule involved is set forth below:[4]

> 6. Failing to carry out any reasonable order by a management representative, including to work on jobs assigned by a supervisor or his authorized representative.

This rule is contained in the section labeled "Most Serious Acts". This section provides "Violation of these rules will result in your immediate suspension pending investigation; and if substantiated, your discharge." (See employee handbook pages 11 and 12 attached to Affidavit of David McPherson, Record p. 76).

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of age discrimination is insufficient to make an issue for the jury in the face of proof showing an adequate, nondiscriminatory reason for his discharge"), *cert. denied*, 467 U.S. 1215, 81 L.Ed.2d 364, 104 S. Ct. 2658 (1984).

[4] This is shown by the Termination Report attached to Plaintiff's deposition and attached to Plaintiff's response. (Record p. 223). This document also reflects Plaintiff's lying to his supervisor about having already clocked out. This is also a violation covered under the "Most Serious Acts" section.

Although Petitioner may argue with Respondent's reason for termination and may offer his own testimony that the rules violation did not occur, Petitioner did not offer any proof which established Respondent's discriminatory intent. Petitioner may argue that his African-American supervisor was incorrect in his perception and testimony about the rules violation. Petitioner may also argue that the African-American supervisor who witnessed the rules violation was incorrect in his perception and testimony regarding the rules violation. However, this is not sufficient. It is not enough to show that the decision was incorrect or that there is evidence that the decision was incorrect. Petitioner failed to show that these individuals (and thus Respondent) had any discriminatory bias against Petitioner who is of the same race as them.

The Fifth Circuit has made it clear that to avoid summary judgment Petitioner's evidence must create an inference of discrimination. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996). Here, even if the fact finder believed Respondent was mistaken in its view of the work rules violation, there is nothing to indicate that the decision to terminate Petitioner's employment was caused by discrimination. Petitioner's supervisor, who was of the same race, was the one who reported Petitioner's improper actions. As the Fifth Circuit Court and other Circuit Courts have generally noted, the fact that the actor involved is also a member of the same protected class makes it more unlikely that discrimination occurred. *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996). Thus, the summary judgment in this case was proper.

D. Petitioner's "Proof" of Other Perceived Acts of Discrimination Does Not Establish Pretext.

Petitioner's complaints about other actions of Respondent also do not show pretext in connection with the employment action in question here, the termination of Petitioner's employment. There is no showing by Petitioner that any of the prior actions complained about in any way affected the Respondent's decision to terminate Petitioner's employment. Respondent disputes these complaints. However, even if these complaints are considered correct for summary judgment purposes, these complaints are not sufficient to show pretext and create an inference of discrimination.

For example, Petitioner claims that Petitioner was in line to serve as a leadman in the absence of his regular leadman and did serve in that position for a day but was subsequently removed and replaced by a white employee who had less seniority than Petitioner. Petitioner's statement that he had more seniority than the white employee is without significance. It is well established that merely showing that decisions are contrary to seniority or years of experience is not sufficient to establish discrimination. *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 959 (5th Cir. 1993). The Fifth Circuit recently noted again that years served do not necessarily mean superior qualifications. *Nichols v. Loral Vought Systems Corporation*, 81 F.3d 38 (5th Cir. 1996). The only other evidence that Petitioner cited is that Petitioner trained the white employee in how to perform the job of leadman. Again, this evidence was not sufficient to show that there was any discrimination

involved. Petitioner failed to show the respective qualifications of the two individuals, himself and the white employee, in any number of ways such as (1) experience in supervision, (2) education, (3) special training, (4) ability to act as a supervisor, (5) ability to get along with and to work well with other people, (6) whether Petitioner's performance on the one day was satisfactory, (7) whether the white employee continued to have the job or was also replaced, and (8) experience in other work settings. Thus, Petitioner failed to show that this incident provides any evidence of discrimination.

Petitioner also failed to show that the white employees he alleged were treated differently were in situations nearly identical to his. *Mayberry v. Vought Aircraft Company*, 55 F.3d 1086, at 1089 and 1090 (5th Cir. 1995). For example, Petitioner claims he once requested to be allowed to leave work early because his wife was sick but was not allowed to do so and states that another employee was granted the right to leave work early when that employee's wife was sick. This assertion does not deal with the incident in question for which Petitioner was terminated where Petitioner was clearly leaving because he wanted to get a tire for his truck. (Petitioner's Deposition, Record p. 173). In any event, Petitioner failed to show that the circumstances were nearly identical in failing to show that the illnesses of the two wives were comparable, the situation at work was comparable, i.e., what were the workplace demands were placed on the supervisor on that day regarding workforce production, availability of other employees, etc. Thus, Petitioner

failed to show that there were nearly identical circumstances involving the two employees on even this unrelated incident.

In *Mayberry*, the court also had to deal with "proof" of other prior incidents of perceived discrimination. There the plaintiff noted prior incidents in which he and others had filed discrimination complaints. The court noted that such complaints, even with an occasional finding that the employer had discriminated against others, do not suggest that the defendant discriminated against Mayberry. *Mayberry* at 1091. The Petitioner herein complains about several incidents in the past which are unrelated to the present issue and for which no prior discrimination complaints were even filed. As in *Mayberry*, such complaints do not suggest that the defendant has discriminated against plaintiff in this instance. *Mayberry* at 1091.

Mayberry also complained that white employees were treated differently when they caused parts to have to be scrapped and based his complaint on the Accumulated Scrappage Material record ("ASM"). However, the court noted the ASM's presented an incomplete picture of such situations and did not show that white employees were treated differently under circumstances nearly identical to Mayberry's. *Mayberry* at 1090. Likewise, Petitioner presents vague complaints about how white employees were treated differently. These complaints also do not show proof of discrimination in this matter as they were not connected with Respondent's decision to terminate Petitioner's employment. Further, these complaints, like the ASM's, provide an incomplete picture which does not show that other employees were treated differently under

circumstances which were nearly identical. Like the ASM's, these complaints fail to show the details of any perceived act of discrimination, such as what any investigation determined, what the work record of the employee was, or the other circumstances of the matter. Thus, these complaints are not proof of even a *prima facie* case and are not proof of pretext or discrimination. *See Mayberry* at 1091.

The weakness of Petitioner's case is further illustrated by his avoidance of the specific incident involved in Petitioner's termination and his desire to focus on other matters. Petitioner does not want to discuss why two African-American supervisors reported that Petitioner refused repeated requests to return to work and left the plant. Petitioner does not even state a reason why he believes the supervisor witness Middleton would create this event. The best evidence that Petitioner provides to refute this is hearsay statements that Bell allegedly told Petitioner that he was following instructions and either Bell or Petitioner was going to get fired. (Petitioner's Brief, page 4, Petitioner's Deposition Record p. 187). These statements are directly contradicted by Bell's affidavit that he agreed with the decision to terminate Petitioner and that race was not a factor in the decision. (Record pp. 60-61).

E. The Claimed Factual Errors in the District Court's Order Do Not Show that The Summary Judgment was Improper.

Petitioner complains that the District Court made three factual errors in the Court's order:

(1) that the Court inaccurately stated that Petitioner was told he was being terminated for violating a workrule which required him to follow a supervisor's directive and for falsification of information on his time card;

(2) that the Court inaccurately stated, in reference to Petitioner's complaint about not being appointed leadman, that Petitioner failed to provide any summary judgment proof of discrimination other than the position was given to a white man with less seniority; and

(3) that the Court's Order inaccurately stated that another employee had been allowed to leave early because his wife was sick and that the District Court did not discuss a similar request by Petitioner which was refused. (Petitioner is not complaining about the incident in question here when Petitioner admitted he wanted to leave to get a tire repaired. See Record pp. 173, 176-77).

Petitioner complains that the District Court order stated that Petitioner was told that he was discharged for two reasons, i.e., violating a workrule which required him to follow a supervisor's directive and for falsification of information. Petitioner's argument with the District Court's order is whether Petitioner was told about the falsification of the time card when he was terminated. Bell's Affidavit (Record pp. 60-61), and the termination report (Record p. 224), both support the Court's statement. The additional comments section of the termination report states "Troy was told to go to work and to help

finish cleaning up. Then he refused after being told several times. Troy went home. He also lied about having punched out his time card." This statement is consistent with Bell's affidavit which shows that Petitioner told Bell he had clocked out at 1:40 p.m., that Petitioner had not gone back to work despite several requests that he do so, and that Petitioner had not actually clocked out until 2:04 p.m. which was after Petitioner had been ordered back to work but had refused to return to work.

In connection with this alleged error, Petitioner attempts to make a minor issue of the fact that James Johnson added the words "Falsification of Information" to the termination report. (Record p. 224). Johnson noted this addition by signing his name next to it. Thus, there is no question of someone attempting to hide this addition. In fact, this addition merely makes the Reason for Separation section consistent with the additional comments section filled out by Calvin Bell which already noted "He also lied about having punched out his time card."

In any case, the termination report and Bell's affidavit clearly show that Petitioner was terminated for his actions in relationship to this incident. Whether Petitioner was told he had violated two rules or one is of no significance. Either rule violation justified his termination. (See Personnel Handbook record p. 76, i.e., Rule 4 "Punching another employee's time card, falsifying any time card or timekeeping record or, intentionally giving false information to anyone who keeps such records" and Rule 6 "Failing to carry out any reasonable order by a management representative, including to work on jobs assigned by a supervisor or his authorized representative.") Both of these rules are listed under the "Most

Serious Acts" section which provides that violation of these rules will result in discharge. Further, both rule violations arose out of the same incident and the discussion of just one would not in any way show pretext as both the termination report and Bell's affidavit showed both violations occurred.

The second "error" in the District Court's order Petitioner complains about deals with the temporary leadman position and whether Petitioner supplied any evidence besides the Petitioner s and the other employee's relative seniority. Petitioner notes that he "trained" the other employee. As discussed in the preceding section, mere seniority is not sufficient, and such testimony of "training" also does not show the respective qualification of the Petitioner and the other employee. Often a person in a lower level will help "train" a new superior just as an experienced legal secretary may train a new lawyer. Such training is often very helpful, but it does not mean that the trainer is more qualified for the trainee's position. Thus, even if Petitioner feels this statement about training makes the District Court order technically incorrect, the result is the same. The Petitioner failed to provide sufficient proof to cause this unrelated incident to be any evidence that Defendant's reason was a pretext for discrimination.

Petitioner next complains that the District Court failed to acknowledge in its order that Petitioner claims to have requested the opportunity to leave early on a different occasion when his wife was sick. The District Court's order accurately reflects that the incident in question, leaving before work is completed to get a tire fixed, was not substantially similar to another employee leaving

early because his wife was sick. Petitioner complains that the Court does not also mention an unrelated occasion when Petitioner says he was not allowed to leave early when his wife was sick. This matter is discussed in detail in the preceding section of this brief. As noted there, Petitioner failed to show that the circumstances for his request were nearly identical to those of the approved request and therefore that incident is no evidence of pretext.

In summary, the Petitioner's complaints about perceived factual errors in the District Court's order do not affect the propriety of the grant of the summary judgment.

F. Conclusion to the Third Ground Section.

The summary judgment granted by the District Court and affirmed by the Fifth Circuit was proper. The Petitioner's proof of a *prima facie* case consisted virtually of his denial that he violated the work rules and his complaints about other unrelated incidents. The District Court correctly found that, even if one assumed that the Petitioner had established a *prima facie* case, Respondent properly came forth with a legitimate non-discriminatory reason for its actions, i.e., the report of two supervisors of the same race as Petitioner that Petitioner had broken the work rules in question. The Respondent's proof included its personnel handbook which showed that violations of such nature were grounds for the termination of Petitioner's employment.

Petitioner then failed to show that the Respondent's legitimate non-discriminatory reason was a pretext and to create an inference of intentional discrimination. Petitioner's proof again consisted of Petitioner's denial that he had violated the work rules and Petitioner's complaint about his treatment in other unrelated incidents. Petitioner failed to show that these prior incidents were related to Respondent's action against him in terminating his employment and also failed, even in those unrelated incidents, to show that he was treated differently than white employees in nearly identical circumstances.

As noted above, it was not sufficient for Petitioner to establish simply that Respondent's decision was wrong. He must also establish that Respondent had a discriminatory reason for its action. Petitioner failed to show that Respondent had a discriminatory reason for such action as Respondent, without dispute, acted on the report of two supervisors of the same race as Petitioner. To show pretext, Petitioner needed to show not only that these two supervisors were incorrect but that they had a discriminatory reason for their action. Petitioner offered no evidence that the supervisors believed their report was wrong or that, if they did, that they made such a report for discriminatory reasons.

The District Court's granting of summary judgment was proper and such judgment was properly affirmed by the Fifth Circuit Court of Appeals.

CONCLUSION

Petitioner has failed to provide any compelling reasons for this Court to grant a Writ of Certiorari. There is no split among the circuits. Rather, in this case and the three cases cited by Petitioner, the Courts of Appeals apparently applied the same rule of law to the different facts presented in each case. Each court then reached a proper decision based on those facts. Further, this case has not been used by the District Court or the Court of Appeals to state a new and important position on an important or unsettled question of the law. Instead, this is a case only of significance to the parties.

Petitioner contends the Fifth Circuit Court of Appeals reached an incorrect result; however, this appears to be an argument that the Fifth Circuit Court of Appeals improperly applied the law established by this Court to the facts in this case. Such an evidentiary review is not favored by this Court. Further, Respondent strongly believes that the District Court and the Fifth Circuit Court of Appeals were correct in their decisions. This case does not merit further review by this Court.

For all of the foregoing reasons, Respondent requests that Petitioner's petition be denied.

Respectfully submitted,

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